December 9, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Terry M. Apodaca
Dates of Filing:	November 10, 2009 November 12, 2009
Case Numbers:	TFA-0336 TFA-0337

On November 10 and 12, 2009, Terry M. Apodaca (Appellant) filed Appeals from two determinations issued to her on October 14, 2009, by the National Nuclear Security Administration Service Center (NNSA/SC) of the Department of Energy (DOE). In those determinations, NNSA/SC responded to requests for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. These Appeals, if granted, would require NNSA/SC to release information withheld under Exemptions 5 and 6, and also to conduct a further search for information responsive to the Appellant's request.

I. Background

On May 18, 2009, the Appellant requested copies of

> 1. All [Office of Public Affairs] OPA personnel actions from May 2007 to present, to include all attached background information and justifications, just as was submitted for consideration.
>
> 2. Any and all complaints and/or grievances filed against any member of OPA, to include the FOIA/PA team, from May 2007 to present in the possession of OPA, Director's office.

First Request Letter dated May 18, 2009, from Appellant to Carolyn Becknell (First Request Letter). In the second request, the Appellant requested copies of

> 1. All documents involved in the processing of DOE Vacancy No. 09-0019, NNSA SC entitled "Lead Information Program Specialist, HQ-0301-03/03. As well as a copy of the successful candidate's job application with all attachments that were submitted, your response should include, but not be limited to:

> (a) all documents generated by Tracy Loughead and/or Al Stotts in ranking all applicants' qualifications.
>
> (b) documents created by any and all individuals in attendance during my interview on March 17, 2009, as well as a listing of their names, titles, a copy of their Position Descriptions, why they were present, the questions they asked and their evaluation of my response.
>
> (c) A copy of any and all notifications issued announcing who was selected for this position; i.e., to any organization in the Service Center to include OPA, and to any office in DOE or NNSA Headquarters.
>
> 2. Position description, performance measures, listing of job duties for this position as well as any and all operating instructions for the FOIA/PA team by which they operate. Listing of contractor employee's names and duties. Copy of training and travel budgets for FOIA/PA team that includes the purpose of each travel expenditure.

Second Request Letter dated May 18, 2009, from Appellant to Carolyn Becknell (Second Request Letter).

On October 14, 2009, NNSA/SC issued two determination letters responding to the Appellant's requests. Determination Letters dated October 14, 2009, from Carolyn Becknell, NNSA/SC, to Appellant (First and Second Determination Letter). In the first determination, NNSA/SC released information that was responsive to the request, but redacted some information under Exemption 5 or 6. First Determination Letter. In the second determination, NNSA/SC released 53 responsive documents to the Appellant.[1/] Second Determination Letter. Information from these documents was withheld under either Exemptions 5 or 6. *Id.* In a few documents, information was withheld under more than one of these exemptions.

On November 10, 2009, the Appellant appealed the second determination. In that Appeal, the Appellant challenged the redactions in 14 of the documents. Appeal E-Mail dated November 10, 2009, from Appellant to William Schwartz, Office of Hearings and Appeals, (OHA), DOE (November 10 Appeal). The Appellant also claimed that none of the documents were responsive to her request 1(c). Finally, the Appellant challenged the

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[1/] Although not numbered by NNSA/SC, the Appellant numbered the documents released to her prior to submitting the Appeal. We have retained this numbering system for ease of discussion in this decision.

adequacy of the search because NNSA/SC did not provide one of the documents listed in determination and did not provide any documents in response her request for "any operating instructions for the FOIA/PA Team." November 10 Appeal.

On November 12, 2009, the Appellant appealed the first determination, claiming that much of the information withheld is releasable. Further, she stated that she could not determine what information was redacted. November 12, 2009, E-Mail from Appellant to William Schwartz. She also challenged the withholding in their entirety of two other documents. *Id.*

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. The nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). In this regard, it is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Exemptions 5 and 6 are at issue in this case.

A. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). The courts have identified three traditional privileges, among others, that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "pre-decisional" privilege. *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 862 (D.C. Cir 1980) (*Coastal States*). The Appellant is challenging NNSA/SC's withholdings under the deliberative process privilege.

In order to be shielded by Exemption 5, a record must be both predecisional, *i.e.*, generated before the adoption of agency policy, and deliberative, *i.e.*, reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The predecisional privilege of Exemption 5 covers records that typically reflect the personal opinion of the writer rather than the final policy of the agency. *Id*. Consequently, the privilege does not generally protect records containing purely factual matters.

Notwithstanding the above, the FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Thus, if a document contains both predecisional matter and factual matter that is not otherwise exempt from release, the factual matter must be segregated and released to the requester.

There are, however, exceptions to the general rule that factual information should be released. The first exception is for records in which factual information was selected from a larger collection of facts as part of the agency's deliberative process, and the release of either the collection of facts or the selected facts would reveal that deliberative process. *Dudman Communications. Corp. v. Dep't of Air Force*, 815 F.2d 1565 (D.C. Cir. 1987); *Montrose v. Train*, 491 F.2d 63 (D.C. Cir. 1974). The second exception is for factual information that is so inextricably intertwined with deliberative material that its exposure would reveal the agency's deliberative process. *Wolfe v. HHS*, 839 F.2d 769, 774-76 (D.C. Cir. 1988). Factual matter that does not fall within either of these two categories does not generally qualify for protection under Exemption 5.

The Appellant challenged the withholding of information from a number of documents under Exemption 5. She claims that the information redacted from Document Nos. 26, 42, 43, 47 and 49,[2/] all of which documents regarded the hiring of the Lead Information Program Specialist in OPA, NNSA/SC did not explain how the information qualified for Exemption 5 protection. We disagree. NNSA/SC explained that the information it withheld was predecisional and part of the deliberative process. We have been provided with copies of these pages. We have reviewed these pages and believe that the information redacted was properly withheld under Exemption 5. These pages contain deliberative information that reflects the personal opinions of the authors. Release of this deliberative information could stifle honest and direct communication of federal employees' opinions. Further, there is no factual information contained in these documents.

[2/]The Appellant also claims that NNSA/SC did not explain why Exemption 2 was cited on this document. We disagree. The Determination Letter clearly states that "[d]isclosure of this information could possibly expose this department, as well as other departments/organizations, to a 'significant risk of circumvention of agency regulations or statutes.'" First Determination Letter. We do not need to address its withholding under Exemption 2, because she has not challenged that withholding, but only the justification.

1. Segregability

The Appellant has also challenged the withholding of the document identified as "NNSA Weights and Screenouts for Lead Information Programs Specialist Vacancy." The Appellant claimed that this document was withheld in its entirety, even though it was released to her as Document No. 5. NNSA/SC indicated that the withheld document was a draft version of the above titled document and should have included "DRAFT" in the title. Memorandum dated November 19, 2009, from Karen Laney, NNSA/SC, to Janet R. H. Fishman, OHA (November 19, 2009, Memorandum.) Drafts may be withheld under Exemption 5 because they may contain information that was not contained in the final version and their release may reveal the give and take of intra-governmental negotiations. However, NNSA/SC did not indicate whether it reviewed the document to determine whether any factual information could be segregated from the draft. We will remand this document to NNSA/SC for a review for segregability.

The Appellant also challenges the withholding of a report by GenQuest, Inc., prepared in response to a grievance she filed. She is claiming that NNSA/SC did not indicate whether or not the document was reviewed for segregability. The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Thus, if a document contains both exempt information and non-exempt information that is not otherwise exempt from release, the non-exempt information must generally be segregated and released to the requestor. We have reviewed the information that NNSA/SC redacted from the responsive information. Other than the GenQuest, Inc. Report, NNSA/SC was very careful with its redactions. We believe that none of the information that was redacted could be reasonably segregated, with the exception of the GenQuest, Inc., report. Therefore, we will remand the GenQuest, Inc., report to NNSA/SC for a review to determine if any of the information within the report could reasonably be segregated.

2. Public Interest

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. The Attorney General has indicated that whether or not there is a legally correct application of a FOIA exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. Memorandum from the Attorney General to Heads of Executive Departments and Agencies, Subject: The Freedom of Information Act (FOIA) (March 19, 2009) at 2. NNSA/SC concluded, and we agree, that disclosure of the requested information would cause an unreasonable harm to NNSA/SC's ongoing decision-making

process. Therefore, release of the withheld information in Document Nos. 26, 42, 43, 47, and 49 would not be in the public interest.

B. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the information. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). The second step is that the agency must determine whether release of the information would further the public interest by shedding light on the operations and activities of the government. *See Hopkins v. HUD*, 929 F.2d 81, 88 (2d Cir. 1991); *Department of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Comm.*); *FLRA v. Department of the Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. Denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the information would constitute a clearly unwarranted invasion of personal privacy. *Reporters Comm.*, 489 U.S. at 762-770. *See Frank E. Isbill*, Case No. VFA-0499 (1999); *Sowell, Todd, Lafitte, Beard & Watson, LLC*, Case No. VFA-0496 (1999).

1. Federal Employee Salary Information

In her Appeal, the Appellant argues that the salaries of federal employees are not withholdable under the FOIA. Office of Personnel Management (OPM) regulations stipulate that present and past annual salary rates are to be made available to the public. 5 C.F.R. § 293.311(a)(4). In the determination, NNSA/SC found that the "basic pay, locality adjustment, adjusted basic pay, and total salary/award . . . if supplied and combined with other identifying information, could allow one to reasonably deduce the performance rating and award for an individual under the NNSA performance based pay plan." Second Determination Letter. We have previously held that a substantial privacy interest would be implicated by the release of the employees' performance rating. *Terry M. Apodaca*, Case

No. TFA-0204 (July 25, 2007);[3/] *see also* 5 C.F.R. § 293.311(a)(6) (performance appraisals are excepted from release). We will not revisit that argument here. We agree where release of salary could result in the determination of an employee's performance rating, release of the salary is exempt from mandatory disclosure pursuant to Exemption 6. *Cf.* 5 C.F.R. § 293.311(b)(1) (recognizing that salary and other information enumerated as releasable under § 293.311(a)(1) -(6) will generally be withheld by an agency if its release is a "list" would "reveal more about the employee on whom information is sought than the six enumerated items, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"). However, we have reviewed the documents in question and some of the salary information that was withheld is not indicative of a performance rating. For example, one Standard Form 50 (SF-50) that had salary information redacted is dated March 16, 2008, the date that NNSA implemented its performance based pay plan. That SF-50 shows the employee's salary increase based on time in service. It does not indicate a salary increase based upon performance. Another SF-50 shows only one salary, not an increase. All the withheld salary information that was redacted from the various documents must be reviewed by NNSA/SC. We believe there are many instances where salaries could have been released, without releasing an employee's performance rating. Any forms which were dated prior to March 16, 2008, should have salary information released. Any forms which show salary information increases not tied to performance must be released.

2. Grievance Information

In her request, the Appellant asked for "[a]ny and all complaints and/or grievance filed against any member of OPA, to include the FOIA/PA team, from May 2007 to present in the possession of OPA, Director's office." In response, NNSA/SC identified two documents. One document, the GenQuest, Inc., report, was addressed above in the section regarding Exemption 5. The other document was a grievance filed by a third party and was withheld in its entirety pursuant to Exemption 6. The Appellant argues that since the person who filed the grievance is no longer employed by DOE there is no longer any privacy concern. We disagree. First, we note that NNSA/SC never identified the person who filed the grievance. Second, courts have recognized that an individual's privacy interest may be diminished if the individual is deceased. *See, e.g., Davis v. Department of Justice*, 460 F.3d 92, 97-98 (D.C. Cir. 2007) and cases cited therein. Nevertheless, neither this office nor the courts have considered such diminution of privacy interest merely because the affected individual has left one job for another. However, it is not clear whether NNSA/SC reviewed the document to determine whether any of the withheld information could be segregated and released without invading the individual's personal privacy.

[3/] All OHA FOIA decision issued after November 19, 1996, may be accessed at http://www.oha.doe.gov/foia1.asp.

Therefore, we will remand this grievance report to NNSA/SC for a determination about whether any information could be segregated and released.

3. Document-Specific Challenges Under Exemption 6

a. Document Nos. 11 and 23

The Appellant asks why the name of the unsuccessful candidate was withheld. Release of the name of the unsuccessful candidate would be embarrassing to that unsuccessful candidate and therefore is a clearly unwarranted invasion of personal privacy under Exemption 6. Moreover, release of the information would not further the public interest by shedding light on the operations and activities of the government. Where a substantial privacy interest has been identified and no public interest, we find release would be a clearly unwarranted invasion of privacy.

b. Document No. 27

The Appellant asks why her scores were released to her, but not the successful candidate's scores. We believe that this information is withholdable under Exemption 6. The Appellant has no privacy interest in her own information. Therefore, for her information the analysis described above stops at this step. But for the successful candidate's scores, the analysis must continue. Release of this information could prove embarrassing to the successful candidate. Moreover, release of the information would not further the public interest by shedding light on the operations and activities of the government. As stated above, where a substantial privacy interest has been identified and no public interest, we find release would be a clearly unwarranted invasion of privacy.

c. Document Nos. 14 and 41

The Appellant challenges the withholdings made in these documents. We believe that the redactions are allowed under Exemption 6. The information withheld consists of an applicant's personal information, *e.g.*, social security number, home address, home e-mail address, home telephone number, that should not be released to the public. Like Document No. 27 above, the information is not specifically required to be released under the OPM regulations. We believe that release of this information could prove embarrassing to the successful candidate and should be withheld. Moreover, release of the information would not further the public interest by shedding light on the operations and activities of the government. As stated above, where a substantial privacy interest has been identified and no public interest, we find release would be a clearly unwarranted invasion of privacy.

C. Other FOIA Matters Raised by Appellant

The Appellant claimed that none of the documents were responsive to request 1(c) in her first request. NNSA/SC explained that "there was no formal notification announcing who was selected for this position. Notification of selectee was verbal, announced in an Office of Public Affairs weekly staff meeting." November 19, 2009, Memorandum. Therefore, there are no responsive documents to produce. Under these circumstances, no search for responsive documents was required.

The Appellant also appealed NNSA/SC's "inability to locate . . . any operating instructions for the FOIA/PA Team." First Appeal Letter. NNSA/SC responded that "[g]eneral instructions for processing FOIA/PA requests [are] available to [the Appellant] at this website http://scweb.na.gov/scbusinessprocesses/13Communications.shtm. . . . No other written records exist." November 19, 2009, Memorandum.

The Appellant challenged the adequacy of NNSA/SC's ability to locate information regarding why the panel members were present for the selection committee, which she claimed should have been included as a portion of Document 39. In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See., e.g., Glen Bowers,* Case No. TFA-0138 (2006); *Doris M. Harthun*, Case No. TFA-0015 (2003). NNSA/SC could not locate any documents indicating why "panel members were present" for the selection committee. NNSA/SC indicated that it contacted Human Resources (HR), where all hiring files are sent after the position is filled. HR responded that the requested information was not in the file. The HR representative continued that "a verbal discussion took place between myself and Tracy Loughead during a HR consultation visit. I advised that I would be present . . . to ensure consistency of the interviews. Tracy advised me that she would select panel members based on them being subject matter experts. Lastly, EEO Rep is always present." E-Mail from Karen Laney, NNSA/SC, to Janet Fishman. In addition, the selecting official was also contacted to determine if she had retained any documents. She answered negatively. We believe that the search conducted by NNSA/SC in regard to this document was reasonably calculated to uncover the requested information.

In her Appeal, the Appellant states that as she "cannot see exactly where information was deleted, the documents need to be processed again to show . . . exactly where the deletion happened." Second Appeal Letter. A title at the top of the page that information was withheld under Exemption 6 and a form that has been "whited-out" is not sufficient under the FOIA. The FOIA states

> [t]he amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

5 U.S.C. § 552(b). We believe this means that an agency must mark documents in a way that makes it readily apparent to the requester where information has been withheld. This can be accomplished by darkening, or "blacking out" the withheld portions of the documents, or by inserting brackets around the withheld portions. We agree with the Appellant that the SF-50 forms as provided to her do not satisfy this portion of the FOIA. We will remand the SF-50 forms to NNSA/SC for a new redaction. NNSA/SC must specify precisely where information was redacted from the form.

Also, in her Appeal, the Appellant asked specific questions about a number of documents. We will address those questions in this section.

1. Document No. 8.

The Appellant asks why personal information was withheld from her when the information was about her. We reviewed the document and did not find any information about the Appellant withheld from her.

2. Document No. 28

The Appellant claims that a document was provided to her but not listed in the final determination letter. NNSA/SC explained that the document that the Appellant has identified as Document No. 28 was in fact an attachment to Document No. 27.

III. Conclusion

NNSA/SC properly withheld information under Exemption 5. However, the GenQuest, Inc., report and other grievance report must be reviewed for segregation. Most of the information withheld under Exemption 6 was properly withheld. However, the document titled "NNSA Weights and Screenouts for Lead Information Programs Specialist Vacancy," which NNSA/SC stated was a DRAFT, must be reviewed for segregability. Also, NNSA/SC withheld federal salary information. All of the federal salary information that was withheld must be reviewed to determine if it can be released. The only federal salary information that should be withheld is salary information that would indicate the individual's performance rating. For the information withheld from the SF-50 forms that

were responsive to the Appellant's second request, NNSA/SC must specify precisely where information was redacted from the forms. We will remand these Appeals to NNSA/SC for further review as specified in this Decision. Therefore, these Appeals will be granted in part and denied in all other respects.

It Is Therefore Ordered That:

(1) The Appeals filed by Terry M. Apodaca, Case Nos. TFA-0336 and TFA-0337, are hereby granted in part and denied in all other respects.

(2) These matters are hereby remanded to the National Nuclear Security Administration Service Center, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 9, 2009